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United States Court of Appeals

For the Second Circuit

October Term, 1956

No. 350

PASQUALE PALERMO,
Plaintiff-Appellee,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,
Defendant-Appellant.

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT

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No.

PASQUALE PALERMO,

Plaintiff-Appellee,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

Defendant appeals from a judgment of the Federal Court for Eastern New York entered on May 8, 1956 upon a jury verdict before Galston, J., awarding plaintiff $65,000 damages for personal injuries sustained on February 16, 1955 while he was working as a longshoreman on defendant's steamship MARINE SNAPPER. The Court's charge and its opinion denying defendant's motions after trial are printed in the Appendix hereto. In this brief references to the Appendix are prefixed with A and references to the record with R.

Facts

On February 15 and 16, 1955 plaintiff, employed by Turner & Blanchard, Inc., was in charge of a gang of longshoremen discharging cargo from No. 2 hold of defendant's steamship MARINE SNAPPER, which lay starboard side to the 35th Street Pier, Brooklyn. Plaintiff claims that

shortly after 7:00 p. m. on February 16, while he was walking forward in the port passageway between the deck house and the ship's side to resume work after supper, he slipped in grease which he did not see because the adjacent bulkhead lights were not lit. Defendant's witnesses testified that there was no grease on the deck, that the bulkhead lights were lit, and that even if the bulkhead lights had not been lit, floodlights on the mast gave adequate illumination.

Plaintiff fell and broke his right elbow. He admitted that he knew before he used it that the passageway was dark and infested with grease spots but "just didn't think" (R 152). He testified that he had seen the grease spots in the passageway earlier that day and on the previous day (R 99, 146) and that he had noticed when he went ashore for supper about an hour before he fell that the bulkhead lights were out and the passageway was dark (R 147-8, 150).

The MARINE SNAPPER, a C-4 cargo vessel, has a raised forecastle deck on which the forward deck house and Nos. 1 and 2 hatches are located. There is a passageway on the starboard side of the deck house similar to the port side passageway plaintiff used. There is also a thwartships passageway across the after side of the deck house which connects the two fore and aft passageways. There was no claim that either the thwartships or the starboard passageway was unsafe. The testimony of Purcell, defendant's supercargo clerk, that the starboard passageway was not unsafe (R 294-5) went unchallenged. Plaintiff testified that he had used the starboard passageway before and could have used it again (R 146-7). Plaintiff's witness, Sorrentino, testified that he always used the starboard passageway (R 85).

Exhibits 1, A, B and H show the area and the passageways. Copies will be handed up at the argument.

Motions, the Charge, etc.

At the close of the evidence appellant moved to dismiss the complaint and for a directed verdict. The motion was denied (R 487). Appellant requested the Court to charge that if the jury found that there was a safe passageway on the starboard side which plaintiff could have used, and that he knew of it but voluntarily chose to use the port passageway, he could not recover (A 10a). The request was denied and appellant duly excepted (R 502).

The jury returned a plaintiff's verdict for $65,000. Appellant duly moved to set aside the verdict, and for judgment notwithstanding the verdict or, in the alternative, for a new trial on the grounds, among others, that the verdict was contrary to law in that appellant had provided a safe route known to plaintiff, and on the ground that the verdict was excessive, particularly in light of plaintiff's flagrant negligence (R 540-2).

In a brief opinion (A 11a-12a) the Court said that the motion to set aside the verdict and for judgment notwithstanding the verdict "must be denied on the ground that there was before the jury proof sufficient to support the allegations of the complaint."

Dealing with the motion to set aside for excessiveness the Court felt that "the jury may have been overgenerous" and admitted that the amount of the verdict "gave me some concern." However, the Court concluded that a Federal Judge cannot set aside a motion for excessiveness "unless it can be demonstrated that there was no substantial evidence to support the verdict."

Appellant argued that, in dealing with the question of excessiveness, the Court must consider whether the jury made any, or adequate, allowance for plaintiff's obvious negligence. Here again, however, the Court felt that it was powerless, saying:

"Nor since the verdict was a general verdict can one speculate as to what part if any the defense of contributory negligence played in the determination of the jury."

The Appeal

This appeal raises two questions:

1. Can the plaintiff recover where he voluntarily chose to use a passageway known to him to be unsafe when there was an available safe passageway known to him?

2. Did the Court have power to consider the motion to set aside the verdict and for a new trial on the ground of excessiveness; if so, should it have considered the jury's allowance for contributory negligence?

POINTS

I. The Court erred in failing to direct a verdict for appellant and in failing to enter judgment notwithstanding the verdict.

There is no question of fact on this point. On direct examination plaintiff admitted that he knew that the passageway he used was "all spotted and greasy." He testified (R 99):

"Q. Now, during this day and the day before when you were on the ship, did you walk in that passageway on the port side where you had your accident? A. Yes, sir.

Q. I am talking about the daylight hours. A. Yes, sir.

Q. Will you tell the Court and jury what you observed about the deck in the area of that winch and the passageway when you walked just before you fell? A. Well, it was all spotted and greasy—

Q. You knew it was there? A. Yes, sir."

On cross-examination he testified (R 143):

"Q. You had worked on the ship the previous day? A. Yes.

Q. You had worked on the ship that day, too? A. Yes, sir.

Q. And you had worked all that day? A. Yes, sir.

Q. How many times did you say you had gone back and forth over that same area? A. About a dozen times.

Q. Was there always grease there? A. Yes.

Q. Always, every time? A. All the time.

• • •

Q. These grease patches were all over the deck in the area of the winch drums; is that what you say? A. Yes, that particular spot, yes.

Q. You knew they were there? A. Yes.

Q. They had been there all that day and all the previous day? A. Yes, sir" (R 146).

He likewise admitted that he knew that the lights were out and the passageway was dark. He testified (R 147-8):

"Q. Now, when you went off for your lunch at six o'clock was it dark yet; do you remember? A. Yes.

Q. Did you go back by the port side? A. Yes, sir.

Q. In the same passageway that you fell? A. Yes, sir.

Q. And what was the situation as to light at that time? A. It was completely dark.

Q. Just completely dark? A. Yes.

• • •

Q. Had you noticed at any time before that those lights were out? A. Yes, sir.

Q. When? A. It was about before I went, six o'clock.

Q. When you went out to lunch at six o'clock you noticed then that both of those lights were not burning? A. That is right, and I told the mate about it.

Q. To whom did you tell about it? A. One of them mates that was on deck" (R 150).

Indeed, he admitted that when he came back after supper he knew both that the passageway was greasy and that the lights were out but "just didn't think" (R 152).

> "Q. So that when you came back after your lunch, you knew that this passageway had grease on it? A. Yes.
>
> Q. And you knew that the lights were out? A. Yes.
>
> Q. And nevertheless you walked along there; is that right? A. Yes, I pass by and I never think for the minute that grease on the floor because your mind on the job.
>
> Q. Did you think and decide to take a chance or— A. No.
>
> Q. You just didn't think? A. Yes, I not think at all."

There is no doubt that he could have used the thwartships passageway on the after side of the deck house and gone forward along the starboard side passageway to No. 2 hatch and by so doing could have avoided the port side passageway known to him to be greasy and unlighted. Although with reluctance, he admitted he could have used the starboard side passageway. He testified (R 146-7):

> "Q. Did you ever use the starboard side? A. Well, once in a while, if I was forced to pass on the other side.
>
> Q. You say if you were forced to pass on the other side? I didn't hear you. A. Well, maybe once a day.
>
> Q. You could pass on the starboard side? A. Well, it is almost against the rules to pass there while the ship was working.
>
> Q. But you could pass on the starboard side? A. Yes, if I wanted to, yes."

Sorrentino, one of plaintiff's witnesses, and whose hatch boss plaintiff was (R 82), testified on direct examination that he never used the port side (R 85):

"Q. Now, Mr. Sorrentino, during the course of that day— A. Yes.

Q. —did you go on the port side at any time? A. No, I got no business to go on that side.

Q. You never there at all? A. No.

Q. So then you never went there so you don't know the condition of that side? A. Not on that side."

He had used the starboard side when he left the ship for supper at 6 p. m. (R 88).

Guarracino, who was also a hatch boss in No. 2 hatch (R 17), admitted, albeit reluctantly, that the thwartships passage was adequate for a man to pass from the port side to the starboard side (R 41-2, 45-6). The passageway clearly appears on the photograph, Exhibit A. By actual measurement it is three feet wide (R 343).

On these facts it is plain that appellant breached no duty to Palermo. Appellant provided him with a safe route to his work, *i.e.*, the starboard passageway, and Palermo knew it but chose not to use it. Since there was no breach of duty the Court erred in failing to grant appellant's motion for a directed verdict, in failing to charge the substance of appellant's request No. 12 (A 10a), to which appellant duly excepted (R 502), and in failing to grant the motion for judgment notwithstanding the verdict.

In *Hardie* v. *New York Harbor Drydock Corporation*, 9 F. 2d 545 (2 Cir.) [1925], a ship repairer fell through a hatch in an unlighted corridor. This Court held that the plaintiff knew, or was chargeable with knowledge, of the dangerous condition and could make no recovery because, there being an alternate, safe route available, his own negligence was the sole proximate cause.

In *Long* v. *Silver Line Ltd.*, 48 F. 2d 15 (2 Cir.) [1931], a ship repairer fell into a tank because the passageway he chose was unlighted. This Court held that there was

no liability because a light way was provided and plaintiff knew it. Citing *Hardie* this Court said:

> "There is no duty to keep a dark way safe if a light way is provided" (p. 16).

In *Holm* v. *Cities Service Transp. Co.*, 60 F. 2d 721 (2 Cir.) [1932], Holm, a seaman off duty, was returning to his room after going for a drink of water. Crossing the well deck, which he knew was greasy, he slipped and fell. He could have returned via the flying bridge which was safe. This Court reversed a judgment for Holm on the ground that his own negligence was the sole cause of his injuries.

In *Johnson* v. *United States*, 74 F. 2d 703 (2 Cir.) [1935], a seaman, off duty and on his way aft to the mess room for supper, walked across the open well deck instead of going below and using the shaft alley. This Court reversed a decree allowing recovery for his death on the ground that there is no liability where a seaman chooses a hazardous way when a safe one is available.

In *Tampa Interocean S.S. Co.* v. *Jorgensen*, 93 F. 2d 927 (5 Cir.) [1938], *certiorari* denied 304 U. S. 566, the Court held in a seaman's case that the following instruction to the jury was proper:

> "You are instructed that if the plaintiff was furnished two methods of entering the 'tween deck space, one obviously safe and the other obviously unsafe, and *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method the defendant is not liable" (p. 930).

Even where there is a likelihood that longshoremen will take the unsafe way rather than the known, safe way the shipowner's only duty is to warn of the danger and where, as here, the injured man already knows the danger, there is no duty to warn and there can be no recovery. *Long* v. *Silver Line Ltd., supra*, 48 F. 2d 15 (2 Cir.). See also

the concurring opinion of L. Hand, C. J., in *Lynch* v. *United States*, 163 F. 2d 97, 99 [1947].

While the Court gave no reason for denying appellant's motions, or for failing to charge No. 12 as requested, plaintiff opposed appellant on these points by arguing that assumption of risk is no defense, relying on *Socony-Vacuum Company* v. *Smith*, 305 U. S. 424 [1939]. But that argument is only an evasion by semantics. The defense was, and is, that, on admitted facts, appellant did not breach its duty to provide plaintiff with a safe place to work, or to reach his work. Nevertheless, in view of plaintiff's attempt to equate the defense that no duty was breached with the doctrine of assumption of risk, a discussion of *Socony-Vacuum* is necessary.

In that case, Smith, a seaman, was injured when, while on duty, he fell from a defective step on which he was standing to enable him to reach an engine bearing he was required to feel periodically. There was evidence that he could have reached the bearing without using the step. The defense was that he chose to use an unsafe appliance when a safe one was available. The Supreme Court stated the question before it as follows:

> "The question is whether assumption of risk is a defense in a suit brought by a seaman under the Jones Act to recover for injuries resulting from his use, while on duty, of a defective appliance of the ship, when he chose to use the unsafe appliance instead of a safe method of doing his work, which was known to him" (pp. 424-5).

After citing this Court's decisions in *Hardie, Johnson* and *Holm, supra,* and after referring, seemingly with approval, to the charge upheld by the Fifth Circuit in *Jorgensen, supra,* the Supreme Court pointed out that Smith was a sailor actually on duty while the vessel was under way at sea, and looked "to the reason of the admiralty rule of assumption of risk in order to ascertain its appropriate

limits" (p. 430). The Court then pointed out the considerations which led it ultimately to conclude that the admiralty defense of assumption of risk is not available against a sailor actually on duty at sea. The Court said:

> "Many considerations which apply to the liability of a vessel or its owner to a seaman for the failure to provide safe appliances and a safe place to work are absent or are of little weight in the circumstances which attend shore employment, in relation to which the common law rules of assumption of risk and contributory negligence have been developed.
>
> The seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. He cannot leave the vessel while at sea. Abandonment of it in port before his discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion. In the performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action. Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. The Arizona v. Anelich, supra, 123, and cases cited; Calmar Steamship Corp. v. Taylor, 303 U. S. 525. It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end. Chelentis v. Luckenbach S.S. Co., 247 U. S. 372, 380, 381; Jamison v. Encarnacion, 281 U. S. 635, 639; Alpha S.S. Corp. v. Cain, 281 U. S. 642; Cortes v. Baltimore Insular Line, 287 U. S. 367, 375; Warner v. Goltra, 293 U. S. 155, 157" (pp. 430-1).

The Court expressly limited its holding to seamen on duty, reserving other questions for future cases (p. 433). Obviously the narrow decision was not intended to apply to longshoremen. This is established by the reasons given for the Court's conclusion expressed in the quotation above.

"The seaman, while on his vessel, is subject to the rigorous discipline of the sea • • •." This is not true of a longshoreman.

The seaman "• • • has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman." This is not true of a longshoreman.

"His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment." This is not true of a longshoreman.

"He can not leave the vessel • • •." This is not true of a longshoreman.

"Abandonment of it in port before his discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion." This is not true of a longshoreman.

"In the performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action." This is not true of a longshoreman.

"Withal, seamen are the wards of the admiralty • • •." This is not true of a longshoreman.

The cases decided since *Socony-Vacuum* are significant. In *Wong Bar* v. *Suburban Petroleum Transport, Inc.*, 119 F. 2d 745 (2 Cir.) [1941], a seaman, having been given liberty, was on his way ashore. To get there he had to climb a ladder from the stern of his vessel to a barge. Two ladders were available, a long one adequate in itself and

a short one adequate if properly held. Wong Bar elected to use the short ladder and relied upon Seabrook, a fellow seaman, to hold it for him. Seabrook let go, the ladder slipped and Wong Bar fell and was injured. The defense was that, an adequate ladder being available, Wong Bar assumed the risk of using the short ladder. This defense was sustained by the District Court. This Court held that Wong Bar's choice was a proper one because the short ladder properly held was as safe as the long ladder and reversed on the ground of Seabrook's negligence in failing to hold the short ladder properly. In dealing with the question, however, this Court pointed out that *Socony-Vacuum* was expressly limited to the situation where the seaman is on duty and reaffirmed its view in *Holm* and *Hardie* which involved injuries to men not on duty.

In *Bohannon* v. *United States*, 92 F. Supp. 700 (S. D. N. Y.) [1950], Leibell, J., affirmed on the opinion below, 185 F. 2d 678 (2 Cir.) [1951], a seaman, on duty at sea, chose to walk across the forward well deck which was unsafe instead of using an elevated catwalk which was safe. Relying upon this Court's decisions in *Holm* and *Johnson*, and pointing out that *Johnson* was cited with approval by the Supreme Court in *Socony-Vacuum*, Leibell, J., held that Bohannon's injuries were due solely to his own recklessness in choosing the dangerous way when a safe way was available to him.

In *Vielski* v. *Pacific-Atlantic S.S. Co.*, 163 F. 2d 553 (9 Cir.) [1947], a seaman on duty stood on an unsafe handrail to reach and repair a relief valve instead of using an available safe staging. The Court distinguished *Socony-Vacuum* and affirmed a decree dismissing Vielski's libel.

In *Grenawalt* v. *South African Marine Corporation*, 130 F. Supp. 432 (S. D. N. Y.) [1955], the decedent, a stevedore, was killed when he fell into a hold while working in an unsafe place although safe places were available to him. Citing *Hardie*, Weinfeld, J., dismissed the complaint.

In *Manera* v. *United States*, 124 F. Supp. 226 (E. D. N. Y.) [1954], a ship repairer was injured when he fell while using an unsafe method of descending to the ship's tanks instead of a safe available ladder. Citing *Hardie*, Byers, J., dismissed the libel, saying that the law

> "• • • visits upon grown men a certain responsibility in selecting a method or means to accomplish a purpose when the choice between a safe and a questionable one is more important to them than to anyone else" (p. 233).

Apart from broader considerations, we respectfully submit that the Courts should be, and are, reluctant to allow any recovery to a man whose injuries resulted, on final analysis, solely from his own neglect to take the most elementary precautions for his own safety.

II. The Court erred in holding that it could not consider the motion for a new trial on the ground of excessiveness of verdict.

On its motions after trial appellant asked the Court to grant a new trial for excessiveness of the verdict unless plaintiff would accept a remittitur to $20,000. Although the Court said that "the amount of the verdict" "gave me some concern" and felt that "the jury may have been overgenerous", it concluded that it was powerless to act "unless it can be demonstrated that there was no substantial evidence to support the verdict" (Opinion, A 11a-12a). Obviously this is not the prerequisite for consideration of a motion to set aside for excessiveness because, if a defendant could establish "that there was no substantial evidence to support the verdict," it would be entitled to a judgment dismissing the complaint. Plainly the Court misconceived its power, and its correlative duty. In *Comiskey* v. *The Pennsylvania Railroad Company*, 228 F. 2d 687 (2 Cir.) [1956], this Court made it clear that the District Court

has both right and duty to condition a denial of a motion for a new trial upon a remittitur where the verdict is excessive, even though there is sufficient evidence to support the verdict. This Court said that

> "The matter of excessive damages is primarily within the discretion of the trial judge * * * though we may review his decision for abuse of discretion * * *.
>
> "Thus it appears from the record that Judge Noonan, through error as to the extent of his authority, failed to exercise his discretion to condition denial of a motion for a new trial upon remission of part of the verdict. While we do not decide how such discretion should be exercised, we find that its exercise is an important right, of which defendant may not be deprived" (p. 688).

Precisely the same situation exists here. Considering itself powerless to do so, the Court failed to exercise its discretion and the matter should be remanded for the exercise of that discretion, as in *Comiskey*.

Contributory Negligence

The Court also erred in deeming itself powerless to consider whether the jury made proper allowance for contributory negligence. The Court said:

> "Nor since the verdict was a general verdict can one speculate as to what part if any the defense of contributory negligence played in the determination of the jury" (Opinion, A 12a).

This holding is directly contrary to that in *Herring* v. *Luckenbach S.S. Co., Inc.*, 137 F. 2d 598 (2 Cir.) [1943], where this Court affirmed the power of the trial court to consider whether proper allowance has been made for contributory negligence and, if not, grant a remittitur. Plainly that is so. As the Supreme Court said in *Socony-Vacuum* v. *Smith, supra*, 305 U. S. 424:

> "The power of the trial judge to guide and instruct the jury and his control over excessive verdicts afford as adequate a protection to owners as in any other case where the negligence of the seaman, whatever its degree, has contributed to an actionable injury" (pp. 432-3).

Against the background of that case, where the Court held, in the case of a sailor on duty, that the effect of contributory negligence was an apportionment of the damages rather than a dismissal of his claim, the reference to the Court's "control over excessive verdicts" must necessarily have included control over inadequate reductions because of contributory negligence. Otherwise the "adequate [a] protection to owners" to which the Court refers would be nonexistent and juries, after listening to the best of instructions concerning the effect of contributory negligence, could award defendants' money unrestrained. See also *Union Pacific R.R. Co.* v. *Hadley*, 246 U. S. 330 [1918], and *Pennsylvania Company* v. *Sheeley*, 221 Fed. 901 (6 Cir.) [1915].

The need for scrutiny of the jury's appraisal of plaintiff's contributory negligence was particularly pressing in this case because of the generality of the charge. The Judge charged only this:

> "Now, in determining liability, there can be no liability imposed on the defendant unless the plaintiff has established to your satisfaction the essential allegations of his complaint. If you find that the plaintiff has done that, then you approach another subdivision of the matter of liability, and that is whether the plaintiff was guilty of contributory negligence.
>
> The defendant says he was. Of course, the burden is on the plaintiff to show that he was free from contributory negligence. As I recall, the plaintiff said that he had gone over this passageway before and that he had noted the grease-spots. Knowing that, should he have been more careful on his return than he was?

> The defendant urges that if the plaintiff knew there were grease spots on the port side in the passageway leading to Hatch 3, why, he should have used the starboard; to which the plaintiff responds that that would not have been a wise move because the unloading was in progress to the shore, the winches were in operation and that the unobstructed passageway was on the port side" (A 7a).

This gave the jury no real guidance. It did not tell the jury that plaintiff had a duty to use reasonable care or to use that degree of care which a reasonably prudent man would use under the circumstances. It did not tell the jury that, in deciding whether or not plaintiff was guilty of contributory negligence, they should keep in mind that he was an experienced longshoreman and had a duty to use his special experience and knowledge to avoid injuring himself. Appellant had asked for such a charge by its request No. 8 (A 10a). The Court refused the request and appellant duly excepted (R 502). The request was proper and the Court erred in failing to charge its substance. *Walker* v. *Lykes Bros. S.S. Co., Inc.*, 193 F. 2d 772 (2 Cir.) [1952]; *Phillips Petrol. Co.* v. *Gibson*, 232 F. 2d 13 (5 Cir.) [1956]; *Cleveland Cliffs Iron Co.* v. *Metzner*, 150 F. 2d 206 (6 Cir.) [1945].

It is, of course, undeniable that Palermo was grossly negligent. He knew the deck was greasy and he knew it was pitch dark before he started to walk along the passageway. This is negligence as a matter of law. *Stoffel* v. *New York, N. H. & H. R. Co.*, 205 F. 2d 411 (2 Cir.) [1953], and cases cited at page 412.

In *Bohannon* v. *United States, supra*, 92 F. Supp. 700 [1950], Leibell, J., characterized as "reckless" a seaman's walking across an unsafe deck when a safe catwalk was available and this Court affirmed on Leibell, J.'s opinion, 185 F. 2d 678 (2 Cir.) [1951]. See also *McLean* v. *Studebaker Brothers Co.*, 221 N. Y. 475 [1917], and *Cosby* v. *City of Rochester*, 1 N. Y. 2d 396 [1956]. The rule was applied

to an infant 13½ years old in *Fox* v. *Mission of the Immaculate Virgin*, 309 N. Y. 812 [1955]. An experienced longshoreman should be held to at least the same standard of care.

Excessiveness

Plaintiff was born in Italy in 1911 (R 90) and had nine years schooling before he came to this county in 1929 (R 91). Since then he has always done manual labor (R 112-3). Although he is righthanded (R 105) he can still write and can drive a car (R 240). At the time of trial, his life expectancy, as distinguished from his work expectancy, was 26 years (R 199).

Plaintiff had been employed as a hatch boss by Turner & Blanchard for about six months prior to the accident (R 92) but not steadily (Exhibit 6) for his was an "extra" gang (R 124). Before that he had been unemployed (R 115). He averaged $70-$80 a week during the 6-8 weeks immediately preceding the accident (R 128). His total earnings as a longshoreman during the four years 1950-1954 were $4,744.03 (Exhibit 6), *i.e.* less than $1,200 per annum. During that time he also worked at some times but not regularly as a shipping clerk at $47-$60 a week and as a stockman at $52-$57 a week (R 118-120).

In October, 1944 he suffered a fractured dislocation of his right shoulder (R 381-2) which incapacitated him for about a year (R 120) and, in the opinion of the doctor who examined him 20 months after that injury, resulted in a 35% permanent loss of function of the right shoulder and a 30% loss of use of the entire right upper extremity due to associated weakness of the elbow and loss of grip (R 382-4). Following injuries to his right elbow in 1952, plaintiff complained of pain radiating down his forearm with occasional swelling of his right hand (R 404).

Plaintiff was not admitted to the hospital until 18 hours after he fell on defendant's ship. The admission diagnosis

showed a markedly comminuted fracture of the right elbow. A satisfactory open reduction was made and plaintiff's post-operative course was uneventful. His general condition on discharge eight days later was satisfactory (R 110). He was ambulant when seen at home the next day (R 258). Although plaintiff's doctor testified that in its present condition his right arm is virtually useless from an industrial standpoint (R 184), a few months after plaintiff left the hospital the doctor had recommended an arthrodesis which plaintiff refused (R 182-3, 187). The arthrodesis would allow substantial use of the right upper extremity without pain (R 182-3, 190-1) and plaintiff would be employable (R 229-230).

Even if plaintiff had not been at all negligent, the $65,000 verdict would be excessive.

CONCLUSION

The judgment appealed from should be reversed and the complaint dismissed, with costs, or, in the alternative, the case should be remanded for consideration of appellant's motion to set aside the verdict and grant a new trial on the ground of excessiveness.

Dated: New York, N. Y.,
September 24, 1956.

BURLINGHAM, HUPPER & KENNEDY,
Attorneys for Defendant-Appellant.

EUGENE UNDERWOOD,
WILLIAM M. KIMBALL,
Of Counsel.

United States Court of Appeals

For the Second Circuit

October Term, 1956

No.

PASQUALE PALERMO,

Plaintiff-Appellee,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Defendant-Appellant.

Docket Entries

1955

Mar. 16—Complaint filed. Summons issued.

Apr. 11—Answer filed.

Apr. 12—Note of Issue Filed.

June 2—Notice of taking deposition filed.

1956

Jan. 24—Notice of Taking Deposition Filed.

Feb. 20—Abruzzo, J. Motion for preference Granted for the April 1956 Term to follow all other preferences heretofore Granted. Settle order. Affidavit of Michael J. Kenny Filed.

Mar. 7—By Abruzzo, J. Pre Trial Order filed.

Mar. 7—By Abruzzo, J. Order filed granting motion for a preference and placing cause on Jury Day Calendar for April 2, 1956, etc.

Apr. 2—Galston, J. Case called—adjd. to April 16, 1956.

Apr. 16—Galston, J. Case called—adjd. to April 24, 1956.

1956

Apr. 24—Galston, J. Case called. R. & P.

May 2—Affidavit of Eugene Underwood Filed.
Affidavit of Robert Klonsky Filed.

May 2—Galston, J. Case called—Trial ordered and adjd. to May 3, 1956.

May 3—Galston, J. Trial resumed and cont'd to May 4, 1956.

May 4—Galston, J. Trial resumed and continued to May 7, 1956—11 A.M.

May 7—Galston, J. Trial resumed, both sides rest,—trial cont'd May 8.

May 8—Transcript of Record of May 3, 1956 Filed.

May 8—Galston, J. Trial resumed—motion to dismiss etc.—denied—Jury returns verdict for pltff. for $65,000—motions reserved—jdgt. docketed—Trial concluded—Order for sustenance filed.

May 16—Notice of motion filed to set aside verdict (May 17, 1956).

May 17—Galston, J. Hearing on motion to set aside. Decision reserved—all papers May 21.

May 23—Galston, J. Decision rendered on motion to set aside verdict. Motion denied (see memo on file). Settle order.

May 29—Notice of Appeal Filed.

May 29—Supersedeas Bond Filed for $72,400.00.

June 7—Transcript of Record Filed.

1956

June 11—Notice of Motion Filed to Correct Transcript etc. June 13, 1956.

June 13—Before Byers, J. Hearing on Motion to Correct Transcript Referred to Galston, J.

June 19—Affidavit of Philip F. DiCostanozo filed.

June 21—By Galston, J. Order filed granting motion to correct transcript.

June 29—By Byers, J. Order Filed Ext. Time to File Record on Appeal to August 27, 1956.

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[488] Charge of the Court

The Court: Members of the jury, we now approach the final chapter in the trial of this case: the case brought by Pasquale Palermo against the Luckenbach Steamship Company, Inc.

As you know, the plaintiff was not employed by the Luckenbach Company but by the stevedoring firm, the corporation known as Turner and Blanchard, Inc. He was injured while on the vessel S. S. MARINE SNAPPER, which was owned and operated by the Luckenbach Steamship Company.

His complaint alleges, in part, as follows: That on the 16th day of February, 1955, the plaintiff, while in the performance of his work in the capacity of a longshoreman and while on deck at the No. 2 hatch of the aforesaid vessel, the S. S. MARINE SNAPPER, he was, through the carelessness, negligence and recklessness of the defendant, its agents, servants and/or employees, and because of the unseaworthy condition of the vessel, caused to slip and fall, as a result of which he sustained serious permanent, devastating and personal painful injuries.

[489] A further allegation of the complaint is that the aforesaid accident was caused without fault or want of care on the part of the plaintiff, who in nowise contributed thereto, but resulted wholly and solely by and through the carelessness, negligence and recklessness of the defendant, its agents, servants and/or employees, in that they failed and neglected to keep the aforesaid vessel, particularly the No. 2 hatch thereat, in a safe and seaworthy condition in failing to provide the plaintiff with a reasonably safe place in which to work and failing and neglecting to make due and timely inspection of the lights, decks, appliances and equipment then and there being used by the plaintiff and his co-workers in the performance of the work at hand, and in failing to provide experienced and skilled employees.

Now, to that complaint the defendant interposed an answer denying the essential material allegations of the complaint. As a result of the allegations of the plaintiff and the denials of the defendant, there arise issues to be determined by you.

Let me say first that in respect to the plaintiff, he has to sustain the allegations which he has made in his complaint by a fair preponderance of the credible evidence. That leads me to follow with this principle [490] of law that you, as the jury, exercise exclusive prerogative in two respects: You pass upon the facts; you are the finders of the facts. Neither what counsel may have said in their summations, in their recollection of what the evidence in the case discloses, nor, indeed, what I may say in any reference that I may make to the record, need conclude you. You are really the finders of the facts. That is the basis of our jury system.

Secondly, you pass upon the credibility of the witnesses. In a case such as this, where there is such conflict in respect to the facts, credibility becomes very important. Now, I can give you no rule of law which will measure credibility. Credibility in the ordinary walks of life, why, it is deter-

mined by the appearance of the man who tells the story: whether there are important contradictions or inconsistencies in his tale. The important factor of self-interest must always be considered. But, by and large, I assume that you will do what we ordinarily do in our walks of life: use your common sense in order to determine credibility.

Now, how do you measure these facts? Let me say that you are to determine the facts on the basis of the record, of the evidence, and you must cast [491] aside any natural inclination that you might have of bias or prejudice or prepossession. It is the evidence that you must consider and that only, together with such principles of law as I have stated or may give you. The evidence consists of what the witnesses have testified to, plus the exhibits in the case.

Now, in this case, the plaintiff described how this accident happened. He said that he and his gang and others of the stevedoring company had been engaged on the steamer, working until about 8 o'clock, having come on board, I think, some time earlier in the afternoon, and that at 6 o'clock they suspended their labors in order to go ashore for their supper. Returning at 7 o'clock or a few minutes thereafter, the plaintiff, with Guarracino, a fellow stevedore, came up on board the vessel, and Guarracino was in the lead, with the plaintiff some five feet behind him—if my recollection serves me accurately.

The plaintiff said that he slipped and tripped and fell and in trying to save himself injured his right elbow and upper arm, the whole arm. Mr. Guarracino did not see the plaintiff fall but heard his exclamation and turned around and found him there.

Now, the important part of the plaintiff's story is that he slipped, he said, on grease, and tripped [492] on the sill and that at the time that passageway was dark. There was no illumination. That forms a critical part of the

plaintiff's case. No one saw him fall. In respect to the absence of light, Guarracino corroborates him. As to the grease, there is some, perhaps, inconsistency in the story told by Guarracino, because he said that the next day after the accident he looked at the spot and saw the grease. Well, that couldn't have been accurate in respect to time because the ship sailed that night and Guarracino wasn't on board to see what the condition of the passageway was the following morning. But he did say that he had observed grease in that passageway.

The question of the presence of grease and the question of the lighting are both contradicted by the defendant's witnesses.

The plaintiff said he saw grease before supper in that passageway. Mr. Purcell, for the defendant, who was the super-cargo clerk, testified he saw no foreign substance in that passageway, and that the passageway was lighted.

The witness who has been referred to as "Shorty" said he saw nothing wrong in the passageway. The watchman says there was no grease and there was [493] illumination.

There is testimony that two of the lights marked in the photographs as Light 1 and Light 2 were out at the time that this accident happened and that one bulb was thereafter restored by the relief mate, who testified here before you yesterday. In addition to that, the matter of illumination was the subject of testimony given by this defendant's witnesses who say that there were lights on the mast, lights that projected forward and aft, and that these lights were flood lights and the aft lights were powerful enough to reach the passageway, so that it wasn't dark.

Well, these are the issues of fact: It is for you to say whether there was grease in the passageway at the time that the plaintiff fell; whether he fell in the manner in which he did say he fell; whether the illumination was on or whether there was no illumination of that passageway.

It is the duty of the vessel, among other duties, in respect to this passageway at least, it is the burden imposed by law on the vessel, to make it seaworthy.

Now, what does seaworthy mean in this case? Seaworthy applied to this case means that that passageway must be reasonably safe for the purpose for which it was intended. Consequently, you have to [494] determine whether it was so, or whether there were other acts of negligence which precipitated this accident.

Now, in determining liability, there can be no liability imposed on the defendant unless the plaintiff has established to your satisfaction the essential allegations of his complaint. If you find that the plaintiff has done that, then you approach another subdivision of the matter of liability, and that is whether the plaintiff was guilty of contributory negligence.

The defendant says he was. Of course, the burden is on the plaintiff to show that he was free from contributory negligence. As I recall, the plaintiff said that he had gone over this passageway before and that he had noted the grease spots. Knowing that, should he have been more careful on his return than he was?

The defendant urges that if the plaintiff knew there were grease spots on the port side in the passageway leading to Hatch 3, why, he should have used the starboard; to which the plaintiff responds that that would not have been a wise move because the unloading was in progress to the shore, the winches were in operation and that the unobstructed passageway [495] was on the port side.

If you should find that the plaintiff contributed to the happening of the accident by his own negligence, that is, after having first found the defendant is liable, if you should so determine, then, from any award you might otherwise give the plaintiff, you have to deduct whatever percentage of negligence the plaintiff is guilty.

Charge of the Court

For the purposes of illustration, and only for the purpose of illustration, let me say this is what I mean: If you were to award the plaintiff X dollars in the event of no contributory negligence by the plaintiff, and if you find that the plaintiff was 50 per cent negligent, then you would, in your verdict, bring in a verdict for X dollars divided by two and not for X dollars.

Now, if there is to be a verdict in favor of the plaintiff for any sum, then you approach the second question in the case, and that is: How are you going to measure the injuries which he sustained and how are you going to reach a sum to compensate him?

Well, I can indicate only elements for your consideration. First, there is the matter of pain and suffering, and in this case, humiliation; secondly, there is the matter of the nature and extent [496] of the injuries; and thirdly, there is the loss of earnings and loss of prospective earnings. How are you going to measure those?

Well, first let me say that any sum you determine on, you must have in mind that a lump sum award to the plaintiff will have an earning power. It will earn money, and therefore the sum should be the present worth rather than X dollars multiplied over the number of years that you think he could keep on working.

Now, there were references made to the expectancy tables. The man was 44 years of age at the time of the accident and he has an expectancy of life of 26 years, point something or other. I have to caution you that expectancy of life is not to be confounded with the matter of the determination of the number of years that the man will be able to work. We all, presumably, have an expectancy of life, but it does not mean that we will be able to earn money during the period of that expectancy.

Now, the testimony of the doctors here, going to the matter of the nature and extent of the injuries, may be summed up in the fact that he cannot carry on the work

of a longshoreman, nor, indeed, in any undertaking which would involve the using of the right arm, beyond the use of the fingers. He can do the work [497] of a watchman; he might perform the work of a messenger.

In determining his average income, you must be convinced that he will make an earnest effort to earn such money as his physical condition will enable him to earn.

This Exhibit 6 will show you what his recorded earnings were during the periods in 1950, 1951, 1952, 1953 and 1954. He wasn't continuously employed because there had been some injury, as testified to by him and the doctors, which interfered with his work during part of the time.

As to 1956, we have nothing to do with that year except as to what he may have earned. The accident happened on February 16, 1955. This exhibit will indicate what the record is with respect to his earnings prior to that time.

That he suffered pain, and that he suffers pain now, those are elements to be taken into consideration; that he sustains a certain humiliation, that is an element also to be taken into consideration. He is also to be compensated for any expenses that he incurred for doctors.

Some reference has been made to compensation. Any reference to compensation in respect to the [498] amounts must be disregarded by you. That is a matter between the plaintiff and his employer, Turner and Blanchard. Compensation has nothing whatever to do with the relationship between the plaintiff and the steamship company.

Such exhibits as are in the case which relate to statements which were made by him or in his behalf, so far as those statements are concerned, and independently of any awards, you may consider those.

Now, Madam Foreman and Members of the Jury, your verdict must be unanimous.

Before you retire with the exhibits in the case, I will ask counsel to note any exceptions.

• • •

Defendant's Requests to Charge

• • •

8. Mr. Palermo had a duty to use reasonable care so as not to injure himself. He had a duty to use the care which a reasonably prudent man would have used under the prevailing conditions and like circumstances, keeping in mind that he was an experienced longshoreman and had a duty to use his special experience and knowledge so as to avoid injuring himself. Thus you might find that Mr. Palermo was negligent if you found that a reasonably prudent longshoreman would not have used the passageway which Mr. Palermo used under the conditions then existing and knowing what Mr. Palermo knew or should have known at the time. Mr. Palermo also had a duty to be alert, and to look out for himself and to observe and avoid danger and he must be presumed to have known what the ordinary use of his faculties should have made apparent to him.

• • •

12. Even if you should find that Mr. Palermo was hurt because the passageway on the port side of the deck housing was unsafe and that the unsafe condition caused the ship to be unseaworthy or resulted from the negligence of the Steamship Company, I charge you as a matter of law that Mr. Palermo is not entitled to any money from the defendant if there was a safe passageway on the starboard side of the deck housing which he could have used and if Mr. Palermo knew or ought to have known that fact and nevertheless voluntarily chose to use the port passageway.

• • •

[537] Judgment

[SAME TITLE]

The Jury empanelled in the above entitled action having rendered a verdict in favor of the Plaintiff in the sum of $65,000—

It is accordingly adjudged that the judgment in the sum of $65,000 be and is hereby entered and that judgment be docketed accordingly and that costs when taxed be docketed.

Dated: Brooklyn, New York,
May 8, 1956.

PERCY G. B. GILKES,
Clerk.

by JOHN F. LANE,
Deputy Clerk.

[543] Opinion Denying Defendant's Post-Trial Motions

The motion to set aside the verdict, and for judgment for the defendant notwithstanding the verdict, must be denied on the ground that there was before the jury proof sufficient to support the allegations of the complaint.

The matter that gave me some concern was the amount of the verdict.

In a memorandum filed today in * Selock v. Waterman Steamship Corporation, Civil No. 12691, I wrote on a similar motion in respect to alleged excessiveness of the jury's verdict. Therein I expressed the opinion that a judge sitting without a jury cannot substitute his judg-

* Opinion in *Selock* printed *infra*, p. 13a.

ment of what the award should be for that of a jury. It is significant that the defendant's memorandum does not disclose any federal authority which would warrant me in so doing. The federal authorities are practically uniform in holding that a judge should be most scrupulous in [544] granting a motion to set aside a verdict on the ground of excessiveness unless it can be demonstrated that there was no substantial evidence to support the verdict. Nor since the verdict was a general verdict can one speculate as to what part if any the defense of contributory negligence played in the determination of the jury. The plaintiff proved facts which the jury was warranted in believing established defendant's liability. The plaintiff also established by medical testimony that the plaintiff was very seriously injured, and that the right upper extremity of his arm was practically completely disabled, and that at most he had the use of the fingers of his right hand to a very limited extent. He suffered extremely great pain and was subjected to a state of mind which might humiliate him throughout his life.

It is not for the court to determine by mathematical formula the elements that are involved in pain and suffering, and nature and extent of injury: and the prognosis of the doctors of permanent disability was apparently received by the jury with full effect.

It cannot be concluded that the jury's verdict was arbitrary or capricious. At most the jury may have been overgenerous, but it is not for the court to determine the amount. See the following cases cited in my memorandum in Selock v. Waterman Steamship Corporation; Werthan Bag Corp. v. Agnew, 202 Fed. 2d 119; Armit v. Loveland et al., 115 Fed. 2d 308, and Jones v. Atlantic Refining Co., 55 Fed. Supp. 17. [545]

The motion is denied.

Settle order.

CLARENCE E. GALSTON,
U. S. D. J.

Memorandum Opinion in * *Selock* v. *Waterman S/S Corp.*

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil No. 12691

May 23, 1956

STANLEY SELOCK,
Plaintiff,

against

WATERMAN STEAMSHIP CORPORATION,
Defendant.

In this personal injury action the jury reported a verdict for the plaintiff in the sum of $28,000.00. Motions made to set aside the verdict and for judgment notwithstanding the verdict were denied with a reservation by the court on the defendant's motion addressed to the alleged excessiveness of the verdict.

I have been disturbed at recent jury verdicts in respect to the amounts awarded. On the other hand, I must recognize the function which a jury performs in weighing the evidence and reaching a conclusion. That the jury is the finder of the facts is not a mere phrase. In consequence, what a court might do in determining an award if sitting without a jury must not be the determinant of a motion to set aside the verdict of a jury as excessive.

In *Werthan Bag Corp.* v. *Agnew*, 202 Fed. 2d 119, the court quoted from *Tennant* v. *Peoria & P.U. Ry. Co.*, 321 U. S. 29:

* Referred to in opinion, *supra* A 11a.

> "Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because judges feel that other results are more reasonable."

In *Armit v. Loveland, et al.*, 115 Fed. 2d 308, it was said:

> "Courts in general are reluctant to disturb a jury's verdict on the ground of excessiveness where the damages are unliquidated and there is no fixed measure of mathematical certainty. *Powers v. Wilson*, 2 Cir., 140 Fed. 2d 960; *U. S. Can Co. v. Ryan*, 8 Circ., 39 Fed. 2d 445."

Jones v. Atlantic Refining Co., 55 Fed. Supp. 17, also discloses, citing *Armit v. Loveland*, supra, that courts in general are reluctant to disturb a jury's verdict on the ground of excessiveness where the damages are unliquidated and there is no fixed measure of mathematical certainty.

On the record in this case disclosing the average earnings of the plaintiff for a three year period, his loss of earnings from 1952 to 1956, and the nature and extent of the injuries which he sustained, the motion is denied.

Settle order.

CLARENCE E. GALSTON,
U. S. D. J.